UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Individually and
As Next Friend of JULIE DOE, a minor,

Plaintiffs,

v.

MYSPACE, INC., and
NEWS CORPORATION,

Defendants.

No. 06-cv-7880 (MGC/AJP)

DEFENDANT MYSPACE, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER

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DEFENDANT MYSPACE, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER

Without waiving any defenses or otherwise responding to Plaintiffs' Verified Complaint, Defendant MySpace, Inc. ("***MySpace***") submits this Memorandum of Law in Support of its Motion to Transfer Venue, which requests that the Court transfer this case to the United States District Court for the Western District of Texas, Austin Division, pursuant to 28 U.S.C. § 1404(a). MySpace is filing with this Court contemporaneously, but separately, a motion to dismiss Plaintiffs' legally defective claims.

I. PRELIMINARY STATEMENT

This case belongs in Texas. The Plaintiffs acknowledged as much when they initially filed this suit against MySpace in state court in Travis County, Texas, expressly alleging that, among other reasons, venue was proper in Travis County because "all or a substantial part of the acts or omissions giving rise to the Plaintiffs' claims occurred in Travis County, Texas."[1] Indeed, the operative event giving rise to the Plaintiffs' claims – an alleged sexual assault – allegedly took place in Austin, Texas, which is located in Travis County. Both the alleged victim, Plaintiff Julie Doe, and the alleged assaulter, Pete Solis, live in or around Austin, as do the police officers, doctors, therapists, and other relevant witnesses in this case, including the alleged victim's mother, Plaintiff Jane Doe. As a result of the Plaintiffs' allegations, the Travis County District Attorney initiated a criminal case that is now pending against Pete Solis in Travis County District Court. Even the electronic communications between Julie Doe and Pete

[1] Plaintiffs' Original Petition ("***Orig. Tex. Pet.***") at ¶ 7, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. June 19, 2006) (attached as Exhibit A to the Affidavit of Clifford Thau, sworn to on October 13, 2006, hereinafter referred to as the "Thau Affidavit"); Plaintiffs' First Amended Original Petition ("***Am. Tex. Pet.***") at ¶ 7, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Aug. 6, 2006) (attached as Exhibit B to the Thau Affidavit).

Solis, which allegedly took place over MySpace.com, occurred while Julie Doe and Pete Solis were living in or around Austin. And given the obvious connection of this case to Austin, Texas, the Plaintiffs' purported causes of action arise under Texas law, a point which the Plaintiffs acknowledged in their prior filings.[2]

In an obvious attempt to find a more favorable forum, however, the Plaintiffs voluntarily dismissed their case in Travis County and refiled it in Bronx County, New York, a venue in which no parties or witnesses reside or have offices and which has no nexus to the operative facts of this case. MySpace, having removed to this Court on the basis of diversity jurisdiction, now seeks to transfer it back to a proper venue – the Austin Division of the United States Western District of Texas. As set forth below, the public and private interest factors of the 28 U.S.C. § 1404(a) analysis weigh heavily in favor of the Western District of Texas. Accordingly, the Court should grant MySpace's Motion to Transfer and send this case back to Texas for the convenience of the parties and nonparty witnesses and in the interests of justice.

II.
BACKGROUND

The Plaintiffs' suit attempts to hold the owners of MySpace.com liable for the alleged criminal conduct of Pete Solis, a 19 year-old Texas resident who is accused of sexually assaulting Plaintiff Julie Doe in Austin, Texas.[3] Like Pete Solis, both Plaintiff Julie Doe and her mother, Plaintiff Jane Doe, reside in Texas.[4]

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[2] MySpace believes that Julie Doe, as a minor, has, under both New York and California law, disaffirmed the MySpace Terms of Use Agreement, May 1, 2006, which contains a California choice-of-law provision.

[3] *See* Orig. Tex. Pet. at ¶¶ 31 & 33 (Ex. A to the Thau Affidavit); Am. Tex. Pet at ¶¶ 31 & 33 (Ex. B to the Thau Affidavit). This Memorandum sets forth an abbreviated discussion of the background facts relevant to MySpace's Motion to Transfer. A more comprehensive discussion of the allegations in this case are set forth in the Memorandum of Law in Support of MySpace's Motion to Dismiss which MySpace expects to file shortly after the instant motion.

[4] Verified Complaint ("***Verified Compl.***") at ¶¶ 1-2.

Despite warnings on MySpace.com that "members must be 14 years of age or older" and that MySpace cannot provide protection to minors who do not accurately identify themselves as such,[5] Plaintiff Julie Doe lied about her age and signed up for a MySpace account, identifying herself as a 19 year old when she was allegedly only 13 years old.[6] The Plaintiffs allege that several months later, after Julie Doe turned 14 years old, she and Pete Solis met online at MySpace.com, and eventually exchanged phone numbers,[7] despite MySpace's warnings that it cannot verify the identities or ages of its users and that users should never share personal information, such as telephone numbers, addresses, or last names.[8] The Plaintiffs allege that Julie Doe and Pete Solis had multiple telephone conversations during which they arranged to go on a date in Austin, Texas on May 12, 2006.[9] The Plaintiffs further allege that during this date Pete Solis sexually assaulted Julie Doe.[10] On May 13, the Austin Police Department initiated its investigation and began to gather evidence surrounding the alleged sexual assault.[11] On May 22, 2006 Solis was arrested and eventually indicted by the Travis County District Attorney's Office for Sexual Assault.[12] As a result of the alleged assault, Julie Doe alleges that she suffered physical and emotional harm and has incurred various medical and psychological counseling expenses – all in Texas.[13]

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[5] MySpace Terms of Use Agreement, May 1, 2006, cited and incorporated by reference in Plaintiffs' Verified Compl. at ¶ 24, and attached as Exhibit A to the Affidavit of Matthew Polesetsky, sworn to on October 12, 2006 and hereinafter referred to as the "MySpace Affidavit."

[6] Verified Compl. at ¶ 27.

[7] Am. Tex. Pet. at ¶ 32 (Ex. B to the Thau Affidavit).

[8] *See* MySpace Terms of Use Agreement, May 1, 2006, at § 8.6 (Ex. A to the MySpace Affidavit). It should also be noted that Plaintiff Julie Doe was not only warned that the age and identity of MySpace users are not verified, but that she herself misrepresented her age and identity when she subscribed to MySpace.com. Pete Solis apparently provided his actual age and identity when he subscribed to MySpace.com.

[9] Am. Tex. Pet. at ¶¶ 30-35 (Ex. B to the Thau Affidavit).

[10] *Id.* Under the Texas Penal Code, Solis's having consensual sex with Julie Doe, a minor more than three years his junior, would constitute sexual assault. TEX. PENAL CODE ANN. § 22.011 (Vernon 2006).

[11] Am. Tex. Pet at ¶ 32 (Ex. B to the Thau Affidavit).

[12] Verified Compl. at ¶ 31.

Following the events of May 12, 2006, Julie Doe and her mother, Plaintiff Jane Doe, sued Pete Solis, MySpace, and MySpace's parent company, News Corporation ("***News Corp.***"), in Austin, Texas seeking $30 million in damages (the "***Texas lawsuit***").[14] Despite Julie Doe's creation of a false profile and her violation of MySpace's Terms of Use Agreement, the Plaintiffs allege that MySpace was negligent and grossly negligent for failing its purported duty to "substantially decrease the likelihood of danger and harm that MySpace posed" to Julie Doe.[15] And despite clear representations to the contrary in the Terms of Use Agreement and "Tips for Parents" page,[16] the Plaintiffs also allege that MySpace committed fraud and negligent misrepresentation by misrepresenting to the public "that MySpace was safe for young underage MySpace users."[17]

Both MySpace, Inc. and News Corp. were served with Plaintiffs' Original Petition in the Texas lawsuit on June 30, 2006, which alleged five causes of action against MySpace and News Corp.: (a) negligence, (b) gross negligence, (c) fraud, (d) fraud by nondisclosure,[18] and (e) negligent misrepresentation. MySpace and News Corp. timely filed, under Texas procedure, an answer and Special Exceptions to the Plaintiffs' claims, seeking dismissal of those claims based on seven legal defects in the form and substance of Plaintiffs' Original Petition. On August 10, 2006, the Plaintiffs filed their First Amended Original Petition and Response to MySpace's

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[13] *Id.* at 20.

[14] Orig. Tex. Pet. at ¶ 94 (Ex. A to the Thau Affidavit).

[15] *Id.* at ¶¶ 42-57.

[16] MySpace Tips for Parents, cited and incorporated by reference in the Plaintiffs' Verified Compl. at ¶ 24, and attached as Exhibit B to the MySpace Affidavit.

[17] Orig. Tex. Pet. at ¶ 59 (Ex. A to the Thau Affidavit).

[18] This claim has been dropped from the New York Lawsuit.

Special Exceptions.[19] While Plaintiffs were able to correct some of the technical defects in the Original Petition, they continued to assert the original five substantive claims against MySpace, all of which remained legally deficient. Because the claims remained legally deficient, Defendants again filed Special Exceptions seeking dismissal.[20] Meanwhile, the Plaintiffs escalated the pursuit of their claims against MySpace and News Corp. in the Texas lawsuit, serving 21 interrogatories, 93 requests for production, and standardized requests for disclosures under the Texas Rules of Civil Procedure.[21]

The Plaintiffs' written response to MySpace's Brief in Support of Special Exceptions was due on September 26 and MySpace's Special Exceptions was set to be heard in Travis County District Court on October 11, 2006. The Plaintiffs, however, never filed a response to MySpace's Brief in Support of Special Exceptions. Instead, on September 27, 2006, the Plaintiffs voluntarily dismissed the Texas lawsuit in the face of a potentially dispositive dismissal ruling on MySpace's Special Exceptions.[22]

Meanwhile, on September 26, 2006, while in the process of dismissing the Texas lawsuit, the Plaintiffs filed the present suit against MySpace and News Corp. in the New York Supreme Court in Bronx County (despite the fact that News Corp., the only New York-based party in this case, has its principal place of business in New York County and no offices in Bronx County). On September 29, 2006, having satisfied all of the procedural requirements of 28 U.S.C. § 1446 and Local Rule 81.1, MySpace removed this action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441.

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[19] Plaintiffs' First Amended Response to Defendants' Special Objections, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sep. 1, 2006) (attached as Exhibit D to the Thau Affidavit).

[20] Defendants' Brief in Support of First Amended Special Exceptions to Plaintiffs' First Amended Original Petition ("First Amended Special Exceptions"), filed in *Doe* v. *MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sept. 1, 2006) is attached as Exhibit C to the Thau Affidavit.

[21] *See* Letter from Plaintiffs' Counsel dated Aug. 21, 2006, attaching Plaintiffs' First Set of Interrogatories to Defendants MySpace, Inc. and News Corporation, Plaintiffs' First Set of Requests for Production to Defendants MySpace, Inc. and News Corporation, and Plaintiffs' Requests for Disclosures to Defendants MySpace, Inc. and News Corporation (attached as Exhibit E to the Thau Affidavit).

[22] *See* Plaintiffs' Motion for Nonsuit Without Prejudice, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sept. 27, 2006) (attached as Exhibit F to the Thau Affidavit); Order Granting Plaintiff's Notice of Nonsuit Without Prejudice, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sept. 27, 2006) (attached as Exhibit G to the Thau Affidavit).

This suit is virtually identical to the Texas lawsuit. Like the Texas lawsuit, the Plaintiffs' Verified Complaint asserts that MySpace and News Corp. (collectively, the "***Defendants***") are somehow responsible for Julie Doe's alleged injuries because they supposedly failed to "substantially decrease the likelihood of danger and harm" Julie Doe might suffer at the hands of other MySpace users and misrepresented "that MySpace was safe for young underage MySpace users."[23] In doing so, the Verified Complaint asserts the same theories of liability and the same underlying facts as were alleged in the Texas lawsuit. Importantly, however, Pete Solis is not named as a defendant in the Verified Complaint, presumably because, as a Texas resident, neither this Court nor the New York Supreme Court in Bronx County could exercise jurisdiction over him.

As explained below, the Plaintiffs have chosen an inconvenient forum to pursue their fatally flawed litigation. The operative events in this matter took place in and around Austin, Texas, and that is where the majority of the potentially relevant physical evidence and witnesses are located. Furthermore, most, if not all, potentially relevant, non-privileged corporate documents are located in California. In fact, aside from the fact that Defendant News Corp. is headquartered in New York and the Plaintiffs' addition of the new and wholly conclusory allegation that "decisions and/or lack of decisions in New York have caused the underlying events in this lawsuit,"[24] this dispute has no nexus to New York. Accordingly, the Court should transfer this matter to the Western District of Texas pursuant to 28 U.S.C. § 1404(a).

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[23] Verified Compl. at ¶¶ 41 & 54.

III. ARGUMENT

The Court should transfer this case pursuant to 28 U.S.C. § 1404(a) to the Western District of Texas because it is an available forum that is far more convenient for the parties and nonparty witnesses, and it will better serve the interests of justice, as demonstrated by the relevant public and private interest factors. Specifically, the Western District of Texas is a preferable forum because: (1) it is a more convenient forum for the relevant parties and nonparty witnesses; (2) it is the location in which the operative facts in this case occurred; (3) it is the only forum in which the relevant non-party witnesses can be compelled to appear for trial; (4) it is the location of the relevant physical evidence; (5) it is the only forum in which Pete Solis, the 19-year old who has been indicted for the alleged underlying sexual assault, is subject to joinder; (6) local interests favor adjudication of this dispute in Texas; and (7) the Western District of Texas is likely to have greater familiarity with Texas law, which the Plaintiffs concede governs their claims. Finally, the Plaintiffs' choice of forum is entitled to little deference in this case because the Plaintiffs are clearly forum shopping. They are Texas residents, not New Yorkers, and they initially filed suit in Texas alleging that it was the proper forum for this suit. For these reasons, the Court should grant MySpace's Motion to Transfer and transfer this case to the Western District of Texas, Austin Division.

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[24] Verified Compl. at ¶¶ 3-4. Tellingly, neither of Plaintiffs' two Texas Complaints alleges that any such "decisions" were made in New York.

A. The Plaintiffs Have Judicially Admitted That the Western District of Texas Is an Available Alternative Forum for This Litigation

The threshold issue in deciding a motion to transfer under 28 U.S.C. § 1404(a) is whether the proposed venue is an available alternative forum, or as § 1404(a) provides, a federal district or division where the case "might have been brought."[25] The Second Circuit has clarified that a transferee court is an available alternative forum if venue and jurisdiction are proper in that forum.[26]

In this case, there is no doubt that the Western District of Texas is an available alternative forum for this dispute. The Plaintiffs conceded this point by originally filing suit in an appropriate forum – a state district court located in the Western District of Texas. In filing this original action in Travis County, Texas, the Plaintiffs judicially admitted that venue was proper in that forum, stating in both their Original Petition and First Amended Original Petition that:

> Venue is proper in Travis County, Texas, pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(a), as all or a substantial part of the acts or omissions giving rise to Plaintiffs' claims occurred in Travis County, Texas. Venue is further proper because this court has personal jurisdiction over Defendants. Defendants have committed tortious acts in Texas, and/or Defendants have committed acts that constitute doing business in Texas.[27]

The Plaintiffs also admit in their Texas filings that personal and subject matter jurisdiction are proper in Texas:

> Jurisdiction over this case is proper as all parties reside in Texas, conduct substantial, continuous and systematic business in Texas, and/or have committed tortious acts within Texas. . . . Furthermore, jurisdiction is proper in Texas under the Texas Long-Arm Statute, Tex. Civ. Prac. & Rem. Code § 17.041 et seq.,

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[25] 28 U.S.C. § 1404(a).

[26] *See Farrell v. Wyatt*, 408 F.2d 662, 666 (2d Cir. 1969) ("[W]here a case 'might have been brought' refers to federal laws of venue, service and jurisdiction.") (quoting 28 U.S.C. § 1404(a)).

[27] Am. Tex. Pet. at ¶ 7 (Ex. B to the Thau Affidavit).

> because Defendants MySpace and News Corp. have committed tortious acts in Texas and acts that constitute doing business in Texas.[28]

Thus, it is clear from the Plaintiffs' allegations that the Western District of Texas, Austin Division, which is located in Travis County, is an available alternative forum for this case. Furthermore, since MySpace appeared and answered in the initially filed Texas lawsuit without challenging venue or jurisdiction, and has agreed not to contest jurisdiction or venue if the requested transfer is granted,[29] there is absolutely no reason why the Western District of Texas would be an inappropriate forum for this dispute.

B. The Relevant Public and Private Interest Factors Weigh Heavily in Favor of Transfer to the Western District of Texas

Not only is the Western District of Texas an available alternative forum, but convenience and justice dictate that it is the preferred forum as demonstrated by weighing the public and private interest factors relevant to this case. As explained below, these factors weigh heavily in favor of transfer to the Western District of Texas, except for the Plaintiffs' new choice of forum, which under the circumstances of this case is entitled to very little, if any, deference.

1. *The Western District of Texas Is a More Convenient Forum for the Parties and Nonparty Witnesses in This Case*

The "logical starting point" for analyzing the convenience of the parties and witnesses is a consideration of their residences in relation to the district chosen by the plaintiffs and the district to which transfer is proposed.[30] Indeed, "[t]he convenience of both the party and nonparty witnesses is probably the single-most important factor in the analysis of whether a transfer should be granted" under Section 1404(a).[31]

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[28] Am. Tex. Pet. at ¶ 6 (Ex. B to the Thau Affidavit).

[29] *See* MySpace Affidavit at ¶ 9. It is anticipated that News Corp. will not contest jurisdiction or venue in the Austin Division of the Western District of Texas because it previously appeared in the Texas lawsuit without making any such objections. *See, e.g.,* Brief in Support of First Amended Special Exceptions (Ex. C to Thau Affidavit).

[30] *Colida v. Panasonic Corp. of N. Am.*, No. 05 Civ.5791, No. 05 Civ. 5796, 2005 WL 3046298, at *3 (S.D.N.Y. Nov. 10, 2005); *accord Nat'l Utility Serv., Inc. v. Queens Group, Inc.*, 857 F. Supp. 237, 241 (E.D.N.Y. 1994); *Heyco, Inc. v. Heyman*, 636 F. Supp. 1545, 1550 (S.D.N.Y. 1986).

Under this factor, there is little doubt that the Western District of Texas is the more convenient forum, as the Plaintiffs and the majority of the potential non-party witnesses reside in that district. The Plaintiffs' filings in this suit and in the Texas lawsuit make clear that both Plaintiffs Jane and Julie Doe reside within the Western District of Texas.[32] The alleged attacker, Pete Solis, also resides in the Western District of Texas.[33] Given that the underlying alleged sexual assault occurred in Austin, Texas and resulted in criminal charges being filed against Pete Solis,[34] the relevant police officers, counselors, therapists, and doctors reside in the Western District of Texas.

In contrast, only Defendant News Corp. is located in the Southern District of New York.[35] Given that News Corp.'s connection to MySpace.com is primarily as the parent corporation of MySpace, Inc., very few, if any, of its employees or executives located in New York have anything to do with the facts of this case. The potential corporate witnesses are located in California, where Defendant MySpace, Inc. is headquartered, and where the vast majority of its employees and executive leadership reside.[36] Furthermore, both MySpace and News Corp. previously appeared in the Texas lawsuit,[37] and MySpace is consenting to jurisdiction and venue in the Western District of Texas, so neither defendant will be inconvenienced by litigating this case in that district.[38] The Western District of Texas is far more convenient to the parties and nonparty witnesses in this case – the vast majority of which reside in that district.

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[31] *Nat'l Util. Serv., Inc.*, 857 F. Supp. at 241; *United States Fidelity & Guar. Co. v. Republic Drug Co.*, 800 F. Supp. 1076, 1080-81 (E.D.N.Y. 1992).

[32] Verified Compl. at ¶¶ 1-2.

[33] Am. Tex. Pet. at ¶ 5 (Ex. B to the Thau Affidavit).

[34] Verified Compl. at ¶¶ 29-31.

[35] Orig. Tex. Pet. at ¶ 3 (Ex. B to the Thau Affidavit). A motion seeking the dismissal of News Corp. as a party is forthcoming.

[36] MySpace Aff. at ¶¶ 4-9.

[37] *See, e.g.*, First Amended Special Exceptions (Ex. C to the Thau Affidavit).

2. *The Operative Facts in This Case Occurred in the Western District of Texas*

As this Court has recognized, "[t]he situs of the operative facts is an important factor in deciding motions to transfer under sections 1404(a)."[39] Transfer is appropriate where, as here, the overwhelming majority of operative facts took place in the transferee court.[40]

Here, the operative facts occurred in the Western District of Texas. Although the Plaintiffs now allege – without any particularity – that "decisions and/or lack of decisions in New York have caused the underlying events in this lawsuit,"[41] their Original and Amended Texas Petitions both concede that "all or a substantial part of the [alleged] acts or omissions giving rise to Plaintiffs' claims occurred in Travis County, Texas."[42] Indeed, Julie Doe is alleged to have created and accessed her MySpace account in Texas, and as a result, any purported reliance by Julie Doe on Defendants' allegedly false representations concerning the safety of MySpace necessarily occurred in Texas. Solis is alleged to have contacted her in Texas, and the two are alleged to have continued to communicate via telephone and other means in Texas, culminating in their meeting and the alleged assault, which also occurred in Texas. Ultimately, all of the harm suffered by Julie and Jane Doe – physical, emotional, financial or otherwise – is alleged to have occurred only in Texas. All of the witnesses that will testify to the alleged damages are also in Texas. At bottom, it is clear that the Western District of Texas is the epicenter of this dispute.

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[38] MySpace Aff. at ¶ 9.

[39] *Sheet Metal Workers' Nat'l Pension Fund v. Gallagher*, 669 F. Supp. 88, 92 (S.D.N.Y. 1987).

[40] *See id.* at 92-93 ("Where a cause of action arises from claims of alleged wrongdoing in the proposed transferee district, transfer is appropriate."); *see also Silverman v. Wellington Mgmt. Co.*, 298 F. Supp. 877, 880 (S.D.N.Y. 1969); *Fogel v. Wolfgang*, 48 F.R.D. 286, 291 (S.D.N.Y. 1969) (both holding that transfer was appropriate where the majority of operative facts took place in the transferee district).

[41] Verified Compl. at ¶¶ 3-4.

[42] *See* Orig. Tex. Pet. at ¶ 7 (Ex. A to the Thau Affidavit); Am. Tex. Pet at ¶ 7 (Ex. B to the Thau Affidavit).

3. *The Relevant Nonparty Witnesses Can Be Compelled to Appear in the Western District of Texas, and Not in the Southern District of New York*

Yet another factor relevant to the § 1404(a) analysis is the transferor and transferee courts' respective abilities to compel the attendance of the relevant non-party witnesses for hearing or trial.[43] In *Designs by Glory, Ltd. v. Manhattan Creative Jewelers, Inc.*, this Court granted a motion to transfer where, just as in the present case, the majority of the nonparty witnesses in the case were Texas residents:

> [The Plaintiff] has listed five non-party witnesses, all Texas residents selling gold at the retail level, who are expected to testify as to the inferior quality of gold they purchased from Manhattan. None of these witnesses are within the subpoena power of this Court, and it would be unnecessarily expensive to have them come to New York to testify were they willing.[44]

Thus, the fact that the majority of non-party witnesses in this case resides in the Western District of Texas affects not only the convenience of litigating there, but it also impacts this Court's ability to compel their appearance at a hearing or at trial. As Texas residents, most if not all of these witnesses will be beyond the subpoena power of this Court.[45] In contrast, transfer to the Western District of Texas will ensure that the parties are able to compel the testimony at trial of non-party witnesses, such as Pete Solis, the alleged assailant, as well as the Texas policemen responsible for investigating the alleged sexual assault, the Texas doctors and counselors purported to have treated Julie Doe for her alleged injuries, and any other eye witnesses who might have knowledge of Julie Doe's relationship with Pete Solis or information about the alleged sexual assault.

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[43] *Fuji Photo Film Co., Ltd. v. Lexar Media, Inc.*, 415 F. Supp. 2d 370, 373 (S.D.N.Y. 2006) (finding that the "availability of process to compel the attendance of unwilling witnesses" is a pertinent factor in determining whether a § 1404(a) transfer is appropriate); *see also Ritz Hotel, Ltd. v. Shen Mfg. Co.*,384 F. Supp. 2d 678, 683 (S.D.N.Y. 2005) (J. Cedarbaum) (holding that a probability that relevant witnesses are located in the proposed transferee forum favors transfer) (citing *Giuliani, S.p.A. v. Vickers, Inc.*, 997 F. Supp. 501, 503 (S.D.N.Y. 1998)).

[44] *Designs By Glory, Ltd. v. Manhattan Creative Jewelers, Inc.*, 657 F. Supp. 1257, 1259 (S.D.N.Y. 1987).

[45] *See* FED. R. CIV. P. 45.

4. *Far More of the Relevant Physical Evidence Is Located in the Western District of Texas than in the Southern District of New York*

The location of relevant physical evidence, particularly physical evidence held by nonparties, is also a relevant factor to the 1404(a) transfer analysis.[46] Just as the Western District of Texas is the locus of the operative facts in this case, it is also the locus of the operative physical evidence. Transfer to the Western District of Texas will ensure that physical evidence and documents, such as reports and notes by policemen, physicians, and counselors, as well as the computers and phone records of the Plaintiffs and Pete Solis, are subject to compulsory process in that forum.[47]

To the extent that MySpace has potentially relevant evidence, the overwhelming majority of that evidence is likely to be in California, where MySpace is headquartered.[48] Thus, transfer to the Western District of Texas will have no effect on the ease of conducting discovery on the merits. While News Corp. might have some relevant, non-privileged documents in New York, that factor is far less important than the location of the nonparty evidence discussed above, because as a party, News Corp. can be compelled to produce relevant documents and to testify about their meaning and creation.[49] Furthermore, MySpace has affirmed that it will not object to the production of any relevant, non-privileged documents based on the location of this action in the Western District of Texas.[50]

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[46] *Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 841 (S.D.N.Y. 1993) (noting that although discovery rules permit defendants to compel document production in certain instances by non-parties outside of the transferor court's subpoena power, transfer was still necessary because without transfer, the defendants could not compel the testimony of the authors of those documents); *see also* 17 Linda S. Mullenix & Georgene M. Vairo, *Moore's Federal Practice* § 111.13[1][h] (3d ed. 2000).

[47] *See* FED. R. CIV. P. 45; *see also* Thau Affidavit at ¶¶ 10-11 for a list of potential material witnesses and evidence.

[48] *See* MySpace Aff. at ¶ 4.

5. *The Western District Is the Only Forum in Which All Proper Parties May Be Joined*

A corollary to the fact that the relevant nonparty witnesses can only be compelled to appear in the Western District of Texas is the fact that the Western District of Texas is the only district in which all proper parties to this dispute may be joined. Although it is plain that Pete Solis is responsible for any alleged harm suffered by the Plaintiffs, and therefore is a proper party to this action under FED. R. CIV. P. 20, as a Texas Resident,[51] he is not subject to personal jurisdiction in New York. Solis is, however, subject to joinder in the Western District of Texas. New York courts consistently have recognized that the fact that a transfer would allow joinder of a proper party is an important factor in determining whether to grant a motion to transfer.[52] Accordingly, the Defendants' interests and the interests of judicial economy favor transferring this action to a forum in which Defendants may join Pete Solis, or at least ensure that he will be available as a trial witness.

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[49] *Computer Operations, Inc. v. Digital Equip. Corp.*, 387 F. Supp. 8, 11 (E.D.N.Y. 1975) ("Section 1404(a) was designed primarily for those cases . . . where defendant's essential witnesses were not under its control and were located in the proposed transferee district and plaintiff could not make the same claim as to its witnesses in the transferor district"); *U.S. Steel Corp. v. Multistate Tax Comm.*, 417 F. Supp. 795, 804 (S.D.N.Y. 1976) ("Generally, a person or corporation subject to a state court's in personam process may be compelled to produce books and records in his custody and control, whether located within or without the court's jurisdiction.").

[50] *See* MySpace Aff. at ¶ 10.

[51] Am. Tx. Pet. at ¶ 5 (Ex. B to the Thau Affidavit).

[52] *Prentice-Hall Corp. Sys., Inc. v. Ins. Co. of N. Am.*, 81 F.R.D. 477, 481 (S.D.N.Y. 1979); *Zangiacomi v. Saunders*, 714 F. Supp. 658, 660 (S.D.N.Y. 1989); *Vassallo v. Niedermeyer*, 495 F. Supp. 757, 761 (S.D.N.Y. 1980); *Ouding v. Nat'l R.R. Passenger Corp.*, No. 93 CIV. 7621, 1994 WL 381437, at *1 (S.D.N.Y. July 19, 1994).

6. *Public Interests Favor Adjudication of This Dispute in the Western District of Texas*

Federal courts have recognized that where, as here, a case involves an injury in a particular locale, there is a public interest in having the case tried in that locale rather than in a remote forum.[53] The State of Texas and the Western District of Texas have legitimate interests in applying Texas law, in protecting the rights of Texas citizens, in determining the appropriate punishment and liability of Pete Solis, and in determining the propriety of MySpace's actions in Texas. Indeed, the local interest in this particular case is especially great given the unprecedented nature of the Plaintiffs' claims against MySpace and News Corp. as demonstrated by the extensive coverage given to this suit by local Austin media.[54] New York and the Southern District of New York, on the other hand, have little or no connection to this matter other than the fact that News Corp. is headquartered in New York, and the fact that MySpace is an Internet company whose services are used in New York, an interest shared by every other state and foreign jurisdiction in which people access MySpace.com. Thus, whatever interest New York has in adjudicating this dispute based on News Corp.'s interest in MySpace is far outweighed by the profound local interests in the Western District of Texas and the Southern District of New York's interests in relieving the congestion of its docket and in not being burdened with matters bearing only an attenuated nexus to the forum.

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[53] *Kolko v. Holiday Inns, Inc.*, 672 F. Supp. 713, 716 (S.D.N.Y. 1987) ("The public interest requires that 'localized controversies [be] decided at home.'") (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (U.S. 1947), which applied common law doctrine of forum non conveniens transfer that was later replaced by § 1404).

[54] Claire Osborn, *Teen, mom sue MySpace.com for $30 million: Suit filed in Travis County claims popular Internet site fails to protect children from adult sexual predators*, American-Statesmen (June 20, 2006), http://www.barryloewy.com/AustinStatesman_MySpace_001.pdf; Leslie Coons, *Buda Man Involved In MySpace Lawsuit Speaks Out*, CBS 42 (Austin) (Jun. 21, 2006), http://keyetv.com/topstories/local_story_172172309.html; Rudy Koski, *Teen charged with assaulting girl he met online*, KVUE News (Austin) May 19, 2006, http://www.kvue.com/news/top/stories/051906kvueassault-eh.70db76.html.

7. *The Western District of Texas Is More Likely to Be Familiar with Texas Law, Which the Plaintiffs Concede Governs Their Causes of Action*

Finally, transfer to the Western District of Texas is favored under § 1404(a) because federal courts favor adjudication of diversity actions by federal courts that sit in the state whose substantive law will govern the case.[55] As the Plaintiffs conceded in the Texas lawsuit, Texas common law will govern their causes of action: "All of Plaintiffs claims asserted in Plaintiffs' First Amended Original Petition are based on Texas common-law."[56]

Indeed, under New York's choice-of-law rules, Texas common law will govern the Plaintiffs' claims. New York's choice-of-law doctrine applies an interest analysis test, which emphasizes that "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."[57] Texas's interests in this dispute are significant: Plaintiffs were allegedly harmed in Texas by a Texas resident; Defendants are alleged to be negligent for failing to prevent that Texas resident from initially contacting and eventually harming another Texas resident; and Plaintiffs claim that they relied on alleged misrepresentations in Texas.[58] By contrast, the Plaintiffs' claims have little, if any, connection to New York. MySpace's parent corporation, News Corp., has its principal place of business in New York County and no offices in Bronx County (though Plaintiffs chose to file this action in the Bronx), the majority of the potentially relevant, non-privileged corporate documents and witnesses are located in California,[59] and the Plaintiffs make only wholly conclusory allegations that "decisions" were made in New York that led to the purported failure to act and misrepresentations.[60]

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[55] *Ritz Hotel, Ltd. v. Shen Mfg. Co.*, 384 F. Supp. 2d 678, 683 (S.D.N.Y. 2005) (J. Cedarbaum) (holding that a familiarity with the applicable law is a pertinent factor in determining if transfer is appropriate under § 1404(a) (citing *Giuliani, S.p.A. v. Vickers, Inc.*, 997 F. Supp. 501, 503 (S.D.N.Y.1998)).

[56] Plaintiffs' First Amended Response to Defendants' Special Objections, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sep. 1, 2006) (attached as Exhibit F to the Affidavit of Clifford Thau). Based on this and similar assertions, MySpace believes that Julie Doe, as a minor, has, under both New York and California law, disaffirmed the MySpace Terms of Use Agreement, May 1, 2006, which contains a California choice-of-law provision.

[57] *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993).

[58] The same result would obtain under Texas choice of law rules. *See Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205-06 (Tex. 2000) (explaining relevant choice of law factors under Texas law).

Even assuming, *arguendo*, that certain decisions regarding MySpace were actually made in New York, that fact would not support an assertion that New York law should be applied. New York law is clear that in personal injury and fraud actions, "the locus of the tort 'is considered to be the place where the last event necessary to make the actor liable occurred,' which is 'where the plaintiff's injuries occurred.'"[61] Here, the Plaintiffs' alleged injuries occurred in Texas, and the Plaintiffs have requested damages for Julie Doe's alleged "pecuniary loss, mental anguish, psychological trauma, pain and suffering, and emotional distress, in the past and the future, as well as future medical and psychological counseling expenses"[62] – all of which have been allegedly suffered and incurred in Texas, where the Plaintiffs reside. In contrast, the Plaintiffs have not alleged any injuries that occurred in New York. Moreover, to the extent that the Plaintiffs' claims include reliance upon certain alleged misrepresentations made by the Defendants, those alleged misrepresentations would have been made to the Plaintiffs in Texas (where Plaintiff Julie Doe accessed and utilized MySpace.com) and Plaintiff Julie Doe's reliance upon those misrepresentations occurred in Texas. Accordingly, Texas substantive law will apply to the Plaintiffs' claims.

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[59] MySpace Affidavit at ¶¶ 7-8.

[60] Verified Compl. at ¶¶ 3, 4.

[61] *Altschuler v. Univ. of Pennsylvania Law School*, No. 95 Civ. 249, 1997 WL 129394, at *11 (S.D.N.Y. Mar. 21, 1997) (quoting *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985)); *see also Palace Explor. Co. v. Petroleum Dev. Co.*, 41 F. Supp. 2d 427, 435 (S.D.N.Y. 1998) ("reliance in New York on defendant's misrepresentation fixes the situs of the injury in New York."); *J.A.O. Acquisition Corp. v. Stavitsky*, 745 N.Y.S.2d 634, 639 (N.Y. Sup. 2001) ("[U]nder New York conflict of law principles, fraud claims are governed by the law of the place of injury – in this case New York, where plaintiffs are located.") (citing *Telecom Int'l Amer., Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999); *Odyssey RE (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y.2000) (*aff'd.* 2 Fed. Appx. 109, 2001 WL 46565 (2d Cir. 2001)).

[62] Verified Compl. at p. 20.

8. *The Plaintiffs' Choice of Forum Is Entitled to Little Deference in This Case*

Although the Plaintiffs' choice of forum is one factor to be considered, federal courts have made clear that a plaintiff's choice of forum is given less weight where, as here, "suit is brought outside of plaintiff's home forum."[63] The Plaintiffs are both residents of Texas, not New York. Moreover, any deference afforded to the Plaintiffs' choice of forum is further mitigated because the operative facts are alleged to have occurred in Texas.[64] Moreover, and perhaps most tellingly, Plaintiffs twice chose Texas as the original forum and made the judicial admission that "all or a substantial part of the acts or omissions giving rise to Plaintiffs' claims occurred in Travis County."[65] For Plaintiffs now to claim that New York is somehow the proper forum for this dispute is at best wrong as a matter of law; at worst, it is a blatant attempt to forum shop.

* * * * *

In sum, MySpace has clearly and convincingly met its burden of establishing that this matter should be transferred to the Western District of Texas. The Plaintiffs' interest in having their preference of forum respected cannot overcome the many factors discussed above, all of which support MySpace's Motion to Transfer Venue.

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[63] *Pesin v. Goldman, Sachs & Co.*, 397 F. Supp. 392, 394 (S.D.N.Y. 1975); *Ritz Hotel, Ltd. v. Shen Mfg. Co.*, 384 F. Supp. 2d 678, 683-84 (S.D.N.Y. 2005) ("While a plaintiff's choice of forum is generally entitled to substantial weight, that choice is accorded less deference when, as here, a plaintiff brings suit outside its home forum").

[64] *Mobile Video Serv., Ltd. v. Nat'l Ass'n of Broadcast Employees and Technicians,* 574 F. Supp. 668, 671 (S.D.N.Y. 1983) ("While in general a plaintiff's choice of forum is entitled to considerable weight, choice is accorded less weight when, as in the instant case, "'[t]he operative facts of [the] case have no material connection with this district.'") (quoting *Credit Alliance Corp. v. Nationwide Mut. Ins., Co.*, 433 F. Supp. 688 (S.D.N.Y. 1977) (citing *Abramson v. INA Capital Mgmt. Corp.*, 459 F. Supp. 917, 921 (E.D.N.Y. 1978)); *see also In re Eastern Dist. Repetitive Stress Injury Litig.*, 850 F. Supp. 188, 194 (E.D.N.Y. 1994) ("[A] plaintiff's chosen forum has no connection to the events which gave rise to the claim for relief, 'plaintiffs choice of forum is a less weighty consideration'") (citing *Helfant v. Louisiana & Southern Life Ins. Co.*, 82 F.R.D. 53, 57 (E.D.N.Y. 1979); *Hernandez v. Graebel Van Lines*, 761 F. Supp. 983, 990-91 (E.D.N.Y. 1991)).

[65] Am. Tex. Pet. at ¶ 7 (Ex. B to the Thau Affidavit).

IV.
CONCLUSION

For the reasons above, MySpace respectfully requests that its Motion to Transfer Venue be granted and that this case be transferred to the Western District of Texas pursuant to 28 U.S.C. § 1404(a).

Dated October 13, 2006

Respectfully submitted,

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I HEREBY CERTIFY that on this 13 day of October, 2006, the Memorandum of Law in Support of Motion to Transfer was served by hand delivery, upon:

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